IN THE
SUPREME COURT OF THE UNITED STATES
Oct. Term, 1973

No. 73 - 6969

ROSS DOUGLAS RING, :

Petitioner, :

vs. :

THE UNITED STATES OF AMERICA, :

Respondent. :

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ROSS DOUGLAS RING petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case, entered on the 12th day of March, 1974.

JURISDICTION

The Judgment of the United States Court of Appeals, for the Fifth Circuit was entered on March 12, 1974. (See Appendix A) A timely Petition for Rehearing, or in the Alternative, to Transfer to Court En Banc in the United States Court of Appeals for the Fifth Circuit was denied on May 31, 1974. (See Appendix B) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

DID THE DENIAL OF RECROSS EXAMINATION CONSTITUTE REVERSIBLE ERROR WHERE THE PROSECUTOR WAS PERMITTED TO EXAMINE A WITNESS AS TO NEW MATTERS ON REDIRECT?

II

DOES A STATEMENT BY THE PROSECUTOR THAT THE GOVERNMENT "HAD NOT DROPPED ANY CHARGES" CONSTITUTE REVERSIBLE ERROR WHERE THE UNCONTRADICTED TESTIMONY OF A GOVERNMENT WITNESS WAS THAT SHE ENTERED A GUILTY PLEA TO ONE COUNT OF A THREE COUNT INDICTMENT AND THAT SHE HAD BEEN ADVISED THAT IF SHE TESTIFIED THE COURT MIGHT BE MORE LENIENT?

POINTS OF ERROR

The Court of Appeals for the Fifth Circuit erred in affirming the Trial Court by a Per Curium Decision.

FIRST POINT OF ERROR

I.

DID THE DENIAL OF RECROSS EXAMINATION CONSTITUTE REVERSIBLE ERROR WHERE THE PROSECUTOR WAS PERMITTED TO EXAMINE A WITNESS AS TO NEW MATTERS ON REDIRECT?

The prosecutor, Assistant U. S. Attorney, Carol Anderson, on Redirect Examination (Tr.60) raised for the first time statements made by the government's witness, Michele Rubio, against the Defendant, Ross Douglas Ring.

The entire Redirect Examination follows:

"BY MRS. ANDERSON:

Q Agent Morphis, do you recall Miss Rubio's making any statement concerning Mr. Ring and participation in the cocaine?

A Yes ma'am. Let me think. She may have said more than one - I am trying to remember now. I did ask her after I found the documents I have identified here, the health certificates, as I have testified, I asked her if she knew Mr. Ring, if they were friends and I asked her if he was aware that she had had the cocaine concealed on her person. And she said that - she replied:

"Of course he did. Of course he knew."

And then later on, when Special Agent Keller and myself transported Miss Rubio to the Marshal's office here, after the arrest, we were driving along in the car and we asked her where

we might be able - we tried to locate Mr. Ring at the airport after Miss Rubio was arrested. We figured if he was traveling with her, he might still be around, being a friend of hers, but we couldn't locate him anywhere. And we asked her where we might be able to contact him. And her reply was:

"Well, what are you so interested in him for? He is just a little fish in this operation."

MRS. ANDERSON: Thank you. I have nothing further." (Tr. 60,61)

It is obvious from reading the above Redirect Examination of the Prosecutor, U.S. Attorney, Carol Anderson, that on Redirect Examination she raised for the first time statements of a vital and crucial nature made by the government's witness, Michele Rubio, against the Defendant, Ross Douglas Ring.

It cannot be emphasized more poignantly than Agent Morphis' statement when he asked Michelle Rubio if Mr. Ring was aware that she had the cocaine concealed on her person, and she replied, "Of course he did. Of course he knew." (Tr. 61,62); that this statement was new matter on Redirect Examination of a vital nature going to guilty knowledge and the essence of the charge of conspiracy ledged against the Defendant, Ross Douglas Ring, in the language of Count I of the Indictment.

It may further be noted that the Prosecutor, Carol Anderson, through her Redirect Examination of Agent Morphis further brings out a new matter of a damning nature as follows:

"And we asked her where we might be able to contact him. And her reply was:

> 'Well, what are you so interested in him for? He is just a little fish in this operation.'" (Tr. 61).

When the defendant's attorney attempted to recross Agent Morphis on this new matter the learned Trial Judge, the Honorable Norman C. Roettger, Jr., stated:

"I am sorry, no recross. Sir, no recross. I don't permit recross." (Tr. 61, 62).

The district courts have some discretion in limiting cross-examination, but they have a considerable amount of discretion in limiting recross-examination. Kitchen v. United States, 221 F. 2d 832, 835 (D.C. Cir. 1955), Cert. Denied, 357 U.S. 928; United States v. Stoehr, 96 F. 2d 276 (3d Cir. 1952), Cert. Denied, 344 U.S. 826. Both the Third and Fifth Circuit Courts of Appeals have further recognized two classes of testimony which might be sought on recross-examination. In the Stoehr Case the Third Circuit stated that:

> Where new evidence is opened upon direct examination, opposing party must be given the right of cross-examination on the new matter, but the privilege of recross-examination as to matters not covered on redirect-examination lies within the trial court's discretion. See 6 Wigmore, Evidence §§ 1897; Faulk vs. State, 47 Ga. App. 804, 171 S.E. 570, 571.

Id. at 280. Hale v. United States, 435 F. 2d 737 (5th Cir. 1970) (citing Stoehr), Cert Denied, 402 U.S. 976, F.R. Cr. P. Rule 26, 18 U.S.C.A. The Stoehr Case involved the prosecution of a Defendant for alleged tax evasion and two objections as to restrictions placed upon recross-examination were raised. Stoehr's first objection was raised when the court refused to allow his defense attorney to reopen a subject on recross which was thoroughly explored on cross-examination. Since the matter in question was not raised by the prosecution on redirect, the court of appeals found that the trial court could refuse to allow those questions in the proper exercise of its discretion. United States v. Stoehr at 280.

A second objection arose after the prosecutor, on redirect, questioned Stoehr's business manager as to tax returns submitted from 1939-1943. The years 1943-1945 were covered on direct and were also mentioned in the indictment. An attempt was made by the defense attorney to question the witness as to his own alleged manipulation of figures prior to 1939, but the court refused to allow the question and the defense objected. Again, since the questions tendered by the defense on recross did not concern matters raised on redirect, the court of appeals found that the trial court "was well within its discretion" in sustaining the objection made by the prosecutor. Id. at 280-81.

The right to recross-examination only exists as to matters brought out on redirect. Id. at 280-81; Hale v. United States, Supra at 751.

Several other cases have held that the refusal to allow recross-examination was not error, but these cases involved either questions which obviously fell within the privileged category or attempted abuses on the part of defense attorneys. United States v. Kahn, 472 F. 2d 272 (2d Cir. 1973) (where the attorney was attempting to break a witness through cross and recross although his testimony was corroborated by other evidence;) United States v. Kenney, 462 F. 2d 1205 (3d Cir. 1972), Cert. Denied; (where the matter was available on cross, no recross was allowed); United States v. Miller, 460 F. 2d 582 (10th Cir. 1972) (where attorney wanted to repeat on recross a question already asked on cross).

However, the present case clearly presents a situation in which the right to recross-examination does exist. That is, the questions directed to Agent Morphis on redirect as to statements made by the government's witness (Rubio) were being raised for the first time on redirect, and under the Stoehr and Hale Decisions the defense had a right to recross-examination as to those new matters. Stoehr, Supra at 280-81; Hale, Supra at 751. Therefore, although the court may exercise discretion as to matters in the privileged category, the weight of authority is that in situations

where new matters are introduced on redirect the right to recross assumes the same status as the right to cross-examination and the discretion to be exercised by the court becomes much narrower.

In J. E.Hanger, Inc. v. United States, 81 U.S. App. D.C. 408, 160 F. 2d 8 (D. C. Cir. 1947), the court stated that "cross-examination is a matter of right and not a mere privilege." Id. at 10. Conceding that "the control of cross-examination is within the discretion of the trial judge," the court went on to state that:

> (It) is only after a party has had an opportunity substantially to exercise the right of cross-examination that discretion becomes operative.

Id. at 10. Similarly the cases seem to support the proposition that the court's discretion can only be invoked after the defense had an "opportunity substantially to exercise" the right to recross-examination.

The Hanger Case was concerned with an alleged conspiracy to fix prices in violation of the Sherman Anti-Trust Act. An employee of one of the defendants testified for the government, and the purpose in calling the witness was to show that certain government exhibits came from the employers file. At the conclusion of the direct testimony, the defense counsel was denied the right to cross-examine. Finding that the refusal to allow the defense to cross-examine the witness constituted an abuse of

discretion which prejudiced the case, the court reversed the lower court's opinion. It is respectfully urged that the denial of the opportunity for recross-examination in the present case where new matters had been introduced on redirect-examination was reversible error.

SECOND POINT OF ERROR

II.

DOES A STATEMENT BY THE PROSECUTOR THAT THE GOVERNMENT "HAD NOT DROPPED ANY CHARGES" CONSTITUTE REVERSIBLE ERROR WHERE THE UNCONTRADICTED TESTIMONY OF A GOVERNMENT WITNESS WAS THAT SHE ENTERED A GUILTY PLEA TO ONE COUNT OF A THREE COUNT INDICTMENT AND THAT SHE HAD BEEN ADVISED THAT IF SHE TESTIFIED THE COURT MIGHT BE MORE LENIENT?

The co-defendant and later turned government witness, Michele Denise Rubio, testified as follows on cross-examination: (Tr. 36, 37, 38)

Q Miss Rubio, you are aware of what you are charged with, are you not?

A Yes, I am.

Q And you are aware, I presume that you are charged with three count indictment, are you not?

A Yes, I am.

Q Do you know what those counts charged you with?

A Yes, I do.

Q What do you believe they charged you with?

A They charged me with possession, importation, conspiracy and intent to distribute.

Q And you only pled guilty to one of those counts, isn't that correct?

A Yes, I did.

Q Which count did you plead guilty to?

A I originally pled guilty to Count II, but now I am going to change my counts and plead guilty to Count I.

Q Which would be conspiracy to import, is that correct?

A Yes sir.

Q You are aware, are you not, that Mr. Ring was only charged with one count of the Indictment?

A Yes, I am.

Q Are you telling us here under oath today, Miss Rubio, no one promises you anything?

A Yes, I am . No one has promised me anything.

Q Anybody advise you that if you testify that it would go easier for you?

A My lawyer said it could help or it couldn't; could go either way.

Q What did he say to you?

A. That, you know, that maybe they would be a little more lenient if I testified but that he couldn't say for sure if they would or not; that he thought it was the right thing for me to do.

So I agreed to come and testify.

Q When he said it might go a little bit easier for you, did you believe him?

A I don't know. I don't know if it will go any easier for me or if it won't.

Q Would it be safe to say that you disbelieved your attorney?

A No, I don't disbelieve him.

Q Then you believed him.

A. Yes, I believe him.

Q That it might go easier for you?

A That it might or might not go easier for me."

The counsel for the defense in his closing argument commented on the co-defendant and government witness, Michele Denise Rubio's answers on cross examination (Tr. 36, 37, 38) in the following language: (Tr. 128)

"I asked Miss Rubio did she expect any leniency. She said, 'No, I don't expect any leniency.' However you know that Miss Rubio was charged with three counts in this Indictment: Conspiracy, importation and possession; but yet miraculously two of these counts have been dropped. Does that create a reasonable doubt as to what she hopes to gain by this? This has never been explained to you.

Also, I'd like to point out something very peculiar. She said no promises were made to her at all; but yet she said under

So I agreed to come and testify.

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Also, I'd like to point out something very peculiar. She said no promises were made to her at all; but yet she said under

cross-examination that her attorney told her it would go better for her if she testified. What does that mean? You draw your own conclusions on that one."

The prosecutor, Carol Anderson, in her closing argument stated: (Tr. 135)

"Ladies and gentlemen , two counts of the Indictment against Miss Rubio have not been dropped. This is a totally inaccurate and false statement."

At this point in the prosecutor's closing argument, defense counsel raised an objection but was not allowed to articulate the grounds upon which the objection was based as the judge overruled him before the objection was entered into the record. (Tr. 135, 136)

After the prosecutor concluded her closing argument, the defense moved for a mistrial due to the prejudicial statement made by the prosecutor in her closing argument, or in the alternative, for additional time to answer the prosecution. Both motions were denied. (Tr. 138)

Attorneys in their jury arguments are never allowed to make representations of their own because they are advocates and not witnesses. Gandy v. United States, 386 F. 2d 517 (5th Cir. 1967),

Cert. Denied, 390 U.S. 1004( ). In the Gandy Case an accomplice who was not indicted, although named as a co-conspirator, testified for the government and stated that he had not been promised any "deals". During his closing argument the prosecutor stated that:

> "I cannot tell you sincerely enough that that is absolutely false and that there is no basis in the fact at all."

Id. at 516. The court held that the prosecutor's statement was not reversible where there was no testimony contradicting the witness' testimony and explained that the prosecutor's statement merely alluded to the statement of the witness. Id. at 518.

However, in the present case the only evidence as to a "deal" was the statement of the government's witness to the effect that upon entry of a guilty plea on one count of a three count indictment, the other two charges were dropped. No evidence to the contrary was introduced. The Supreme Court held in Napul v. Illinois, 360 U.S. 264 (1959), that where a witness falsely testified that he had not received any promises for his testimony and the assistant state's attorney failed to correct him, the defendant in the case was denied due process of law under the Fourteenth Amendment.

In the present case the comment of the prosecutor, Carol Anderson, so severely prejudiced the Defendant's case to the jury that failure of the trial judge to grant a mistrial denied the defendant his fundamental right to due process under the due

process clause of the Fifth Amendment of the Constitution of the United States of America.

There is overwhelming authority to support the proposition that the statement made by the prosecutor was improper. It has been stated that:

> Every defendant is of course jealously protected against inflammable statements, (and) against prejudicial statements not based upon the evidence or fair and reasonable deductions from it... United States v. Sober, 281 F. 2d 244 (3d Cir. 1960).

United States v. Barbone, 283 F. 2d 628, 632 (3d Cir. 1960). The District Attorney in his argument to the jury is required to limit himself to a "discussion of the facts disclosed by the evidence or legitimate inferences which may be deduced." United States v. Holt, 108 F. 2d 365 (7th Cir. 1940), Cert. Denied, 309 U.S. 672, Rehearing Denied, 309 U.S. 698.

In United States v. Spangelet, 258 F. 2d 338 (2d Cir. 1958), the Second Circuit Court of Appeals held that:

> Where defendant's counsel attempted to impeach the testimony of a major witness for the prosecution by showing that his bail had been reduced from $50,000 to $1,000 after a conference with the prosecutor, and where defendant's counsel in his summation referred to the reduction in bail and stated that the witness had every motive for lying, the statement of the assistant United States Attorney in reply in her summation that she had never made a deal with anyone was reversible error, which was not

> cured by an instruction that the only time a person testifies is when he takes the stand and testifies from the witness stand, and that the Assistant United States Attorney was not testifying.

Id. at 338 (emphasis added). The Spangelet case is directly on point with the case at hand with the exception that the"deal" in Spangelet involved a substantial reduction in bail while the "deal" in the present case involved the dropping of two counts in the Indictment. Crucial to the analysis here is the recognition that in both instances key government witnesses received some benefit from, or consideration for, testifying for the government.

In United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965), the Ninth Circuit Court of Appeals noted that:

The evidentiary rule involved is expressed in Wigmore, Vol. III § 967 (3d ed.)

> It bears against a witness' credibility that he is an accomplice in the crime charged and testifies for the prosecution, and the pendency of any indictment against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State. So, too, the existence of a promise or just expectation of pardon for his share as accomplice in the crime charges.

Id. at 800 (emphasis added). Since questions concerning the credibility of witnesses are reserved for the jury in our system, statements such as the one made by the prosecutor in the present case infringe upon the province of the jury. Further expounding upon the theory upon which the previously mentioned evidentiary rule is based, the Marchese court stated that:

> everyone is interested in bettering himself and in saving himself from punishment, and hence that the testimony of such an accomplice testifying with the hope or existing possibility or promise of future benefit or leniency should be carefully tested and weighed and considered by the trier of fact. Cf. United States v. Masino, 275 F. 2d 129 (2d Cir. 1960); Meeks v. United States, 163 F. 2d 598 (9th Cir. 1947); United States v. Hogan, 232 F. 2d 905 (3d Cir. 1956).

Id. at 800. The court further stated that:

> (The) jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

ID. at 800. Therefore, prosecuting attorneys must be restricted from invading the province of the jury.

The present case is representative of the situtation described in the preceding paragraph. As its key witness the government called a co-conspirator, Michele Denise Rubio, and the jury could very well have based their decision as to the defendant's innocence or guilty upon whether they believed the witness.

It is respectfully submitted that the prosecutor, Carol Anderson, in the instant case clearly and prejudicially invaded the province of the jury and committed reversible error.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the judgment and sentence of the lower court should be reversed.

The defendant was deprived of due process of law and a fair trial as guaranteed by the Constitution of the United States of America and by the prejudicial error committed by the prosecutor and the trial judge.

Secondly, that there is conflict in the ruling of the United States Courts of Appeals regarding the aforementioned questions and the law is not clear on thispoint and in support of the same would cite the cases previously mentioned.

Thirdly, it is imperative that the United States Supreme Court clarify the law which is currently in conflict between the various United States Courts of Appeals.

Respectfully submitted,

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